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No. 96-871

Supreme Court, U.S.
FILED
MAY 5 1997
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In The

Supreme Court of the United States

October Term, 1996

STATE OIL COMPANY,

Petitioner,

v.

BARKAT U. KHAN
and KHAN & ASSOCIATES, INC.,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED FOR REVIEW

1. Did the court below correctly hold that the imposition of vertical maximum prices by a supplier was a *per se* violation of the Sherman Act?

2. Did the court below correctly hold that a gasoline dealer which lost sales volume and profits as a direct result of the vertical price restraints imposed by its supplier suffered an antitrust injury?

PARTIES TO THE PROCEEDING

Khan & Associates, Inc., an Illinois corporation, has no parent or subsidiary companies.

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STATEMENT OF THE CASE

Defendant, State Oil Company ("State Oil"), is a distributor of gasoline products for several major oil companies including Union Oil Company ("Union").

Plaintiff, Barkat U. Khan ("Khan"), entered into a Service Station/Convenience Store Lease/Supply Agreement ("Agreement") with State Oil (JA 14-32). As part of the renewable three-year Lease Agreement for the operation of the Unocal 76 business in Addison, Illinois, Khan paid State Oil a $75,000 "origination fee" and a $25,000 "going concern fee" (JA 16).

Khan was required to purchase all of his gasoline and automotive products from State Oil and resell the gasoline under the Unocal 76 trademark (JA 26). By the terms of the Agreement, State Oil set the resale price of gasoline sold by Khan. Khan purchased that gasoline for $.0325 per gallon less than the suggested retail price (JA 26). If Khan raised his price above the suggested price, the Agreement required that any excess revenue was to be paid to State Oil (JA 26-27).

Khan paid his rent pursuant to the Agreement in a timely manner through December of 1992 (JA 36). However, he was unable to pay the rent under the Agreement in January of 1993. On January 28, 1993, State Oil served Khan with a Notice of Termination and instituted a state court proceeding to evict Khan. In that proceeding State Oil sought and obtained a court appointed receiver to operate the station. The receiver took over the operation of the station on February 9, 1993, and remained in possession of the station through October 1993 (JA 36-38).

The receiver did not follow the price restraints imposed by State Oil under the Agreement (JA 37), and obtained a margin greater than $.0325 per gallon on his aggregate gasoline sales (JA 38-39). The receiver lowered the price on regular grades of gasoline while raising the price on premium grades to the market level (JA 37). Using this approach, which was prohibited to Khan by the terms of the Agreement, the receiver increased sales volume and profit margins (JA 38-41).

The District Court held that the Agreement was not an unreasonable restraint of trade and that the injury claimed was not an antitrust injury. The Court of Appeals, in reversing, held that the Agreement constituted maximum price fixing which was *per se* illegal. *Khan v. State Oil Co.*, 93 F.3d 1358, 1360 (7th Cir. 1996). The Court of Appeals also found that the injuries claimed by Khan flowed form the anti-competitive aspects of the challenged restraint and, thereby, constituted antitrust injuries.

SUMMARY OF ARGUMENT

The antitrust laws mandate that prices are to be determined by the interplay of economic forces in the market. In furtherance of this fundamental premise of the Sherman Act, the Court has declared every attempt to interfere with the natural interplay of market forces by fixing or artificially setting price to be a naked restraint of trade. All price restraints, whether vertical or horizontal or minimum or maximum, have been condemned as *per se* illegal.

Albrecht v. Herald Co., 390 U.S. 145 (1968), is in keeping with the fundamental purpose of the antitrust laws.

By preventing a supplier from setting a maximum resale price, *Albrecht* insures that market forces will set a competitive price. Absent the *per se* ban on vertical maximum price restraints, there is a substantial risk that both price and non-price competition will be stifled. Indeed, as in this case, the maximum price restraint will result in the artificial setting of the minimum price. The Court should resist the invitation to erode the *per se* rule presented by Petitioner.

The principal reason advanced for overturning *Albrecht* is that maximum price restraints can offset the market power of retailers thereby promoting interbrand competition. This argument is premised upon the unproven and faulty assumption that retailers possess market power. Certainly this record is devoid of any evidence that Khan had market power or the intention to raise prices above competitive levels. To the contrary, Khan complained that he could not lower prices in order to maximize sales of certain products in response to market conditions. As can be seen in this case, suppliers are not always acting in the best interests of competition and the consumer.

Continued application of *Albrecht* is also justified by the principle of *stare decisis*. Congress has, for almost thirty years, left the *per se* rule in place for vertical price restraints. Any change in the application of that *per se* rule is best left to Congress.

Finally, the record reflects that Khan suffered the very injuries contemplated by the antitrust laws. Khan lost sales and profits because he could not set prices in accordance with market conditions. By restricting his margins and prices, State Oil removed Khan as an effective interbrand competitor on regular grades of gasoline. Thus, his losses are antitrust injury.

ARGUMENT

INTRODUCTION

In an unbroken line of decisions, this Court has condemned as unlawful agreements fixing prices. The illegality of price-fixing has been upheld in cases of horizontal agreements, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), as well as vertical agreements. *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911). Recognizing the dangers to free competition posed by price-fixing, this Court has also declared agreements fixing either minimum or maximum prices to be unlawful naked restraints of trade. *Socony-Vacuum*, *supra*, and *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982).

This long established line of authority is grounded upon recognition that "[p]rice is the 'central nervous system of the economy' and an agreement that 'interfere[s] with the setting of price by free market forces is illegal on its face'". *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978) (citations omitted). As early as *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927), this Court declared "[t]he aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition". It is therefore not surprising that this Court has consistently interpreted the Sherman Act itself as foreclosing attempts to justify price fixing. In *Socony-Vacuum*, 310 U.S. at 221-222, the Court rejected various justifications for fixing prices, including lack of market power, ruinous competition and the reasonableness of the fixed price because the Sherman Act "places all such schemes beyond the pale and protects that vital part of our economy

against any degree of interference". Consequently, the *Socony-Vacuum* Court held that any agreement "raising, depressing, fixing, pegging or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*". 310 U.S. at 223.

Opponents of the *per se* rule seek to chisel away at the *per se* illegality of price-fixing. The first blow is struck here at the *per se* ban on vertical maximum resale price maintenance announced in *Albrecht v. Herald Co.*, 390 U.S. 145 (1968). Believing this to be the vulnerable link in the *per se* rule, Petitioner argues that the conceptual groundwork of *Albrecht* has now been weakened, and that *Albrecht* should thus be overturned. But Petitioner's argument mischaracterizes the *Albrecht* rationale. *Albrecht* is founded upon the well established prohibition against price fixing, and not solely on the misperceived evils of vertical restraints of trade. Petitioner's mischaracterization of *Albrecht* is designed to divert the Court's attention from the very real threat to competition when the price setting mechanism of the market is usurped.

Even to engage in the analysis proposed by State Oil erodes the *per se* rule against price fixing. The utility of the *per se* rule lies in its inclusiveness. Under a *per se* rule, an extensive judicial inquiry is not required to analyze in minute detail each challenged price-fixing scheme to determine whether it is reasonable or unreasonable. To require, as Petitioner suggests, a case by case determination of whether the *per se* rule applies in reality does away with the rule. *Per se* rules and case-by-case determinations are mutually inconsistent. Moreover, the *per se* rule should not be abandoned merely because it condemns a practice which might be found reasonable

if a rule of reason approach were applied. *Arizona v. Maricopa County*, 457 U.S. at 345. Principles of *stare decisis* mandate that the *per se* rule not be abandoned so lightly.

In short, the position advanced by Petitioner reflects a fundamental and disturbing distrust of competition. State Oil, a marketer for Union Oil Company, maintains that market forces of supply and demand in the retail gasoline market cannot be trusted to set competitive prices. Consequently, State Oil contends that it should be permitted to impose artificial prices upon its retailers. Respondents contend, to the contrary, that granting State Oil the power to manipulate market prices to reflect the oil companies' view of the "competitive" price will invariably lead to the anti-competitive effects foreseen by this Court in the cases establishing and enforcing the *per se* ban on price fixing. This Court should not accept the invitation to start down the road to the abolition of the *per se* rule.

I.

VERTICAL MAXIMUM PRICE RESTRAINTS SHOULD REMAIN PER SE ILLEGAL

A. Vertical Maximum Price Restraints Are Anti-Competitive.

In *Albrecht*, this Court announced that vertical maximum price restraints are *per se* illegal. In the almost thirty years since *Albrecht*, the *per se* ban on vertical maximum price restraints, although criticized by commentators, has remained the law. Certainly, if *Albrecht* had abolished a pro-competitive practice, the ill effects of

that decision would have been felt in some market by now. Yet, aside from theoretical criticisms of *Albrecht*, Petitioner has offered no evidence that the *per se* ban on vertical maximum price restraints has distorted competition in any market. Absent proof of an actual effect on competition, this Court should not discard the *per se* ban on vertical maximum price restraints. Academic and theoretical concerns unsupported by demonstrated harm to competition do not warrant this drastic re-interpretation of the Sherman Act. Overturning *Albrecht* ought to require persuasive, expert testimony establishing that the *per se* rule has distorted the market. But Petitioner has presented no evidence on this critical point at all. The evidentiary record, and not economic theory unsupported by the record, is what this Court should properly consider. *Eastman Kodak v. Image Technical Services Inc.*, 504 U.S. 451, 467 (1992).

The anti-competitive nature of vertical maximum price restraints was detailed by the *Albrecht* Court. The principal vice of these schemes is that the judgment of the seller is substituted for the market forces of competition impeding "the ability of buyers to compete and survive". 390 U.S. at 152. The effects of this market distortion range from limiting the ability of dealers to furnish services to having the scheme "acquire all the attributes of an arrangement fixing minimum prices". 390 U.S. at 153.

Of particular importance in this case is the *Albrecht* Court's warning that maximum prices can become the minimum price when a dealer's margins are low. In such a case the constrained dealer lacks the ability to profitably charge less than the maximum price resulting in that price becoming, in actuality, the minimum price.

That risk is enhanced where, as here, the supplier not only sets the price but sets the dealer's margin. Faced with such a constraint on margins, a dealer could not profitably reduce prices when competition dictated.

The factual record in this case establishes the existence of these anti-competitive results. As the Petitioner concedes, it set the maximum price at which Khan was allowed to sell by setting both the wholesale price and the maximum margin at which Khan could sell gasoline (Petitioner's Brief at p. 9 fn. 1). Specifically, State Oil set the suggested retail price for regular gasoline above market levels. With almost no margin, Khan was prevented from setting prices according to market conditions. Not only could he not increase prices on premium grades of gasoline to market levels, he could not lower prices on regular gasoline to competitive levels, without suffering a monetary loss.[1] Consequently, Khan was removed as an effective interbrand competitor on regular gasoline. Given these constraints, Khan could neither increase his sales volume nor his profit margin and he was forced to default on his lease with State Oil and go out of business.

[1] The record establishes that Khan could have lowered prices on regular gasoline to gain sales while subsidizing the decreased margin by higher prices on premium grades (JA 38). The benefit of increasing premium prices and reducing the price of regular gasoline was established by the experience of the receiver who operated the station at a profit and with greater sales volume after Khan defaulted on his lease with State Oil.

Ignoring the factual record, State Oil attempts to cloak itself with the mantle of competition.[2] Espousing consumer benefit, State Oil suggests that its maximum price restraint created no adverse effect on competition because the consumer did not pay a higher price than would otherwise have prevailed in the absence of that restraint. Incredibly, Petitioner makes the bald assertion that "a maximum price limitation cannot be used to reduce interbrand competition" (Petitioner's Brief at p. 10). Yet, that is exactly what happened here. Khan, because of the constraint on his margins, was eliminated as an interbrand competitor. His customers paid more than market price for regular gasoline. Indeed, freed of the margin constraint, the receiver lowered price and increased sales. That fact indicates that State Oil's price constraints lessened competition. *Albrecht* eliminates this possibility by barring all vertical maximum price restraints. As *Albrecht* recognized, it is competition and not the possibly erroneous judgment of the seller that should control market prices.

This is the very result which the *Albrecht* Court acknowledged could occur. The existence of this impact on

[2] Petitioner and the Amici supporting the reversal of *Albrecht* cite several commentators who suggest that vertical maximum price restraints do not impact competition. However, not all recent economic literature agrees that vertical maximum resale price restraints are benign. There is now a suggestion that under certain conditions vertical maximum price restraints may have the effect of increasing prices paid by the consumer. *See* O'Brien & Shaffer, *Vertical Control with Bilateral Contracts*, 23 Rand J. Econ. 299 (1992) and Perry & Besanko, *Resale Price Maintenance and Manufacturer Competition for Exclusive Dealerships*, 39 J. Indus. Econ. 517 (1991).

minimum prices and interbrand competition makes this an inappropriate case to overturn the *per se* rule, especially in light of the continued vitality of the *per se* rule in vertical minimum price restraint cases. *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

A further consumer injury flows from maximum price fixing. By squeezing a retailer's profit margin, services may be denied to consumers. Petitioner wrongly suggests that this Court should ignore this type of an injury because it does not relate to price competition. Yet, it is quite clear that non-price competition on services is an important element of actual competition in the market place, especially in commodity-like markets. Ironically, the need to provide full service is one of the reasons generally advanced by those advocates of treating vertical restraints differently from horizontal restraints. *See Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977). Certainly any scheme denying consumers the benefit of valuable services which would be available if competition remained unfettered is anti-competitive.

When stripped of its rhetoric, Petitioner's position is that maximum price fixing, whether vertical or horizontal, should not be *per se* illegal. Petitioner focuses on the lack of an impact on interbrand competition and on the alleged benefits to consumers from lower prices. These arguments apply to both horizontal and vertical restraints on maximum price. Thus, any rule which would distinguish between horizontal and vertical maximum price restraints would be artificial at best. This Court should not reopen the issue of whether maximum price fixing should be treated differently under the antitrust laws than minimum price fixing.

In *Arizona v. Maricopa County Medical Society, supra*, this Court rejected a challenge addressed to a *per se* ban on maximum price fixing. Although reviewing a horizontal agreement, the Court explained quite clearly that maximum price fixing was still *per se* illegal and "on the same legal—even if not economic—footing as agreements to fix minimum or uniform prices". 457 U.S. at 349. The Court's reasoning that "[t]he *per se* rule is 'grounded on faith in price competition as a market force [and not] on a policy of low selling prices at the price of eliminating competition'" remains persuasive. 457 U.S. at 349 (citations omitted). This Court has long recognized that competition, and not artificially set prices, will benefit consumers. In this regard, there is no distinction between a vertical agreement and a horizontal agreement.

The anti-competitive effects of vertical maximum price restraints have actually arisen in this case. This Court should not ignore this unrebutted evidence. The *per se* rule is the best way to deal with this risk in the future.

B. Vertical Maximum Price Restraints Rarely Promote Competition.

Petitioner argues that the *per se* rule should not apply to vertical price restraints because such restraints can be used to promote competition. Portraying retailers, such as Khan, as the enemies of competition and the consumer, Petitioner contends that suppliers must have the ability to impose maximum prices to prevent retailers with market power from gouging consumers. This argument has absolutely no relation to the facts here. Petitioner has presented no evidence that Khan, the operator of a single gasoline station in suburban Chicago, has the nec-

essary market power to impose monopoly prices. Further, the record contains no evidence that any retailer has such market power. Simply because Petitioner can conjure up the specter of a monopolist retailer, no matter how fanciful, is no reason to abandon the *per se* rule.

The pro-competitive aspects of vertical maximum price restrictions championed by opponents of the *per se* rule are a mere illusion. The alleged pro-competitive effects are premised upon the incorrect assumption that retailers for one reason or another are not subject to competitive market forces. Unless the retailer has market power, it would not be able to maintain prices above competitive levels for significant periods of time.

Since, as this Court has recognized in *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988), retailers rarely, if ever, possess the market power necessary to impose higher than competitive prices, there is simply no need to permit the imposition of vertical maximum price restraints to protect against that remote possibility. The market forces of competition will act to limit retail prices to the appropriate levels. On the off chance that a retailer has monopoly power or is engaged in a horizontal conspiracy with other retailers, the antitrust laws would act to control that illegal conduct. These remedies are a far less drastic alternative than trusting suppliers to regulate competition at the retail level by imposing maximum prices.

Petitioner's position, while espousing the virtues of competition, seeks to avoid the interplay of market forces at every turn. Interestingly, Petitioner concedes that a maximum price restraint would only be dictated if the

supplier wished to impose a price other than the price that would prevail in the market. Instead of allowing sellers to set prices at artificial levels, this Court should allow market forces to dictate prices. Petitioner has failed to present a single compelling reason to abandon reliance on market forces to set the appropriate price.

Petitioner devotes a substantial portion of its argument to its complaint that *Albrecht* imposes limitations on a manufacturer's manner of doing business. For example, State Oil claims that it might not be able to set a volume maximizing price. Once again, Petitioner's argument is premised on the assumption that market forces will not work at all levels in the chain of distribution. Normally, these market forces will dictate a competitive price which optimizes consumer benefit in terms of supply, service and price.

It must be remembered that State Oil voluntarily opted to distribute gasoline through retailers such as Khan. It cannot now complain that this arrangement places it at a disadvantage in adopting various marketing strategies. State Oil is free to set the wholesale price to Khan. State Oil's profitability depends on its ability and willingness to set a wholesale price which is in sync with the retail market price—i.e., a price which permits Khan to maximize volume while earning a sufficient profit to remain in business. That is the risk inherent in selling through dealers. If State Oil does not wish to run that risk, it should operate its gasoline stations directly.

Petitioner would have this Court believe that Khan wished to set a price which would not maximize volume. The record totally disproves this suggestion. Khan's com-

plaint arose because he sought to maximize volume by lowering price on regular gasoline while raising prices to market levels on premium grades. Khan's expert determined that the receiver who operated the gasoline station after Khan not only increased profit margins, he increased volume by approximately twenty percent using the pricing policy which Khan would have employed (JA at 38). Certainly, such unrestrained pricing would have benefitted Khan, State Oil and the consumer. A dealer, such as Khan, is simply not the enemy of competition.

State Oil's suggestion that maximum price restraints would foster competition is particularly disingenuous given the form of price restraint imposed by State Oil. Because State Oil has chosen to set the maximum price by restricting gross margins, it has, in reality, eliminated Khan's incentive to maximize volume by lowering prices. Under this scheme, there is simply no reason for Khan to lower retail prices because any retail price discount on a particular grade will merely reduce his overall margin. If Khan were free of this restraint, he would be more willing to temporarily reduce his margin to increase volume, since he could recoup that discount at a later date. Consequently, State Oil has itself restricted Khan's ability to increase volume while remaining in business.

Any potential risk that the *per se* rule will be applied to pro-competitive vertical maximum price restraints is greatly lessened, if not eliminated, by the requirement that a plaintiff prove antitrust injury. Because a plaintiff must prove that it has suffered a loss flowing from the anti-competitive aspects of a challenged restraint, it is highly unlikely that the restraint could be pro-competitive. For example, a retailer with market power will

be unable to demonstrate, as Khan has done here, that it lost business because it could not afford to lower its prices to meet competition.[3]

This Court should not abandon the *per se* rule because State Oil made a poor business decision in severely restricting its dealer's margin. If State Oil had simply allowed competition to set the prices, Khan could have priced to maximize volume, as the receiver did.

C. Principles Of *Stare Decisis* Dictate Continued Application Of The *Per Se* Rule In Cases Of Vertical Maximum Price Restraints.

In *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977), this Court explained that considerations of *stare decisis* weigh heavily against overturning prior decisions interpreting the antitrust laws "where Congress is free to change this Court's interpretation of its legislation". Although almost thirty years have passed since *Albrecht*, Congress has not acted to alter the application of the *per se* rule to vertical maximum price restraints. In fact, Congress has affirmatively expressed its interest that vertical price restraints remain *per se* illegal.[4]

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[3] While Khan does not suggest the antitrust injury rule be used to erode the *per se* rule, the Court should find that, under any circumstances, proof of interference with market forces setting price coupled with proof of an antitrust injury is sufficient to support a presumption of illegality.

[4] With the possible exception of merger policy, there is probably no area of antitrust where Congress has displayed such an explicit and abiding intent to set policy for the courts and enforcement agencies as in the area of resale

(continued...)

While acknowledging this principle, Petitioner argues that an exception to strict application of *stare decisis* exists when the development of the law has undercut the conceptual underpinning of the prior decision or where developments have rendered the decision irreconcilable with other legal doctrines. *Neal v. United States*, 116 S.Ct. 763, 769 (1996), quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989). This exception does not apply to this case.

To establish that *Albrecht* has been undercut, Petitioner argues that *Albrecht* is solely grounded upon *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), which was overruled in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977). As explained above, *Albrecht* is more properly characterized as grounded upon the ban on price fixing than upon the *per se* ban on non-price vertical restraints. Because *GTE Sylvania* is a vertical non-price restraint case, it has not undercut the conceptual underpinnings of *Albrecht* related to protection of competitive pricing. In fact, since this Court has continued to recognize the *per se* ban on vertical minimum price restraints, the *Albrecht* concern that maxi-

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[4] (...continued)

> price maintenance . . . . Following the *Dr. Miles* decision in 1911, Congress has revisited the area of resale price maintenance regularly—almost in clockwork 20-year cycles—with special attention to the empirical effects of the policy on consumers and interstate commerce. However, it has only been in the past 6 years that Congress has been compelled to take numerous legislative steps to ensure that the *per se* prohibition against resale price maintenance would not be eviscerated by the very officials whose sworn duty it is to enforce the laws.

H.R. Rep. No. 237, 102d Cong., 1st Sess. 4 (1991).

mum price restraints will become minimum price restraints remains conceptually sound. *See, e.g., California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

Petitioner's suggestion that the *Albrecht* should be overturned because it is wrongly decided is not enough to overcome *stare decisis*. This Court has on two occasions refused to overturn the rule that baseball is not so involved in interstate commerce as to be covered by the antitrust laws. *Toolson v. New York Yankees, Inc.*, 346 U.S. 356, 357 (1953) (*per curiam*) and *Flood v. Kuhn*, 407 U.S. 258 (1972). This Court deferred to the "positive inaction" of Congress. *Flood*, 407 U.S. at 283-84.

In an apparent attempt to distinguish *Toolson* and *Flood*, although uncited in Petitioner's brief, State Oil again, with no support in the record, suggests that businesses have not taken advantage of the *per se* rule against vertical maximum price restraints. To the contrary, since *Albrecht*, substantial investments have been made by distributors, dealers and franchisees in various businesses in reliance on their freedom to price in relation to market conditions. These investment decisions were made in anticipation that a fair return on investment could be earned through competitive pricing. For example, Khan invested over $100,000 to obtain the right to do business as a Union 76 dealer. A reversal of *Albrecht* would subject these businesses to the possible imposition of price and margin restraints which have previously been illegal. This Court must ask itself whether these investments would have been made if maximum margins could be restricted. It must be remembered that Khan could not shop around for lower priced gasoline. He was required to deal exclusively with State Oil. The

loss of Khan's sizeable investment provides a practical reason for applying *stare decisis* in this case.

II.

KHAN SUFFERED AN ANTITRUST INJURY

There can be no question that a plaintiff must establish antitrust injury even in *per se* cases. *Atlantic Richfield Company v. USA Petroleum Company*, 495 U.S. 328 (1990). Antitrust injury is an injury of a type for which the antitrust laws provide relief and which flows from the characteristic that makes a defendant's conduct unlawful. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). However, the antitrust injury requirement should not be applied so as to eliminate the *per se* rule.

In determining whether Khan has suffered an antitrust injury, it is necessary to identify whether his injury is related to an anti-competitive aspect of the vertical maximum price restraint under scrutiny. This Court has already specifically identified the antitrust injuries flowing from vertical maximum price restraints. In *Albrecht* and *Atlantic Richfield* the Court identified the antitrust injury as related to the bound buyer's ability to compete and survive in the market. *See Atlantic Richfield*, 495 U.S. at 335. Specifically, as noted above, one anti-competitive element of such a scheme is that the maximum price tends to become the minimum price when the maximum price approaches actual cost. Thus, the antitrust injury for a retailer subject to a maximum price restraint is, as here, a restriction on its ability to profitability compete. *See also*, *Caribe BMW, Inc. v. Bay-*

erische Motoren Werke Aktiengellschaft, 19 F.3d 745, 753 (1st Cir. 1994).

The losses suffered by Khan are exactly the type of losses that flow from the anti-competitive aspects of a vertical maximum price restraint that has become a minimum price restraint. First, Khan could not profitably compete on regular gasoline. The suggested pump price of regular gasoline set by State Oil was higher than the prevailing market rate. Thus, the wholesale price ($.0325 less than the suggested pump price) did not leave Khan sufficient margin to meet these prices. Khan could either meet the market price to maximize volume at a loss or he would lose volume. In either case, Khan was put at a serious disadvantage.

Second, Khan lost profits because he could not increase his prices on premium gasoline to offset losses on regular gasoline. The direct result of the price restraint was to prevent Khan from raising the price for premium grades to market levels. Finally, caught in this profit squeeze, Khan went into default and lost his business.

Petitioner, in order to argue that Khan suffered no antitrust injury, is forced to distort the record by ignoring the crux of Khan's claim and evidence. Petitioner suggests that Khan did not claim that the maximum price had become the minimum price. This is simply untrue. Khan specifically argued in the lower court that the margin restraint prevented him from lowering price on regular gasoline with a resulting loss of business. In fact, Khan's expert, whose opinions were unrebutted, specifically declared that the removal of the price restraints by the receiver resulted in lower prices and margins on regular gasoline with a corresponding greater

sales volume (JA 38 at ¶6-7). The receiver was able to offset the lower prices and margins on regular gasoline by raising prices on premium grades to market levels (JA 38 at ¶6-7). All of this was accomplished with an overall volume gain of twenty and eight-tenths percent (20.8%) (JA 38 at ¶7).

These findings undoubtedly show antitrust injury. Khan lost sales volume because he could not operate his business in the manner best suited to maximize volume. Khan lost profits because he was forced to sell premium gasoline at below market levels while being forced to forego offering a competitive price on regular gasoline. In the absence of the challenged price restraint, Khan would not have suffered these losses.

Petitioner argues that *Atlantic Richfield* holds that such losses are not antitrust injury. This argument misconstrues *Atlantic Richfield*. There, the Court dealt with the definition of antitrust injury in the context of a complaining competitor and not that of the bound dealer. Those positions are inherently different. A dealer which has its margins restricted so that it cannot lower prices to meet competitive conditions suffers an injury that a competitor does not. That is precisely what happened here. Khan was prevented from competing on regular grades of gasoline because of margin limitations. He lost sales volume and profits. That loss is antitrust injury.[5]

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[5] Petitioner relies on the Seventh Circuit Opinion to suggest that losses suffered by a constrained buyer's inability to raise prices may not be antitrust injury. This position, however, conflicts with the Seventh Circuit decision in *Slowiak v. Land O'Lakes, Inc.*, 987 F.2d 1293 (7th Cir. 1993).

CONCLUSION

For the foregoing reasons, the decision of the court below should be affirmed.

Respectfully submitted,

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